gration status and acquitted the appellant on the "employment charge." He should have accepted Perumal's evidence that Perumal was not provided lodging by the appellant and that the appellant did not know that he had slept in the barber shop. The trial judge should not have invoked the presumption. Nor should he have inferred that Perumal was able to sleep in the barber shop on occasions with the appellant's knowledge because Perumal on those occasions had the keys to the barber shop. Perumal was not asked by the prosecution why he was given the keys. It could be that he was to lock up the barber shop for the night or to open it in the morning when he came to work. The trial judge should not have inferred that Perumal was given the keys by the appellant so that Perumal could spend the night in the barber shop.

For these reasons the appeal is allowed. The conviction and sentence are set aside.

Appeal allowed.

Solicitors: *S. Rajagopal & Co.*

HARRISONS & CROSFIELD (N.Z.) LTD. v. LIAN AIK HANG (SUED AS A FIRM)

[O.C.J. (Lai Kew Chai J.) February 26, 1987]

[Singapore – Suit No. 3645 of 1981]

Sale of Goods – Sale by description – Sale by sample – Sale of peanut kernels – Samples not representative of peanut kernels shipped – Aflatoxin in excess of permissible limit – Breach of implied undertaking – Liquidated claim or damages alternatively – Sale of Goods Act, 1979, s. 15.

By two written contracts contained in telexes in 1980 entered into between the plaintiffs and the defendants, the defendants agreed to sell to the plaintiffs a maximum of 314 metric tons of peanut kernels of 60/70 pieces per ounce TBS (*i.e.* Thai Brown Skin) to be packed in new jute bags at the price of US$1,447 per metric ton C & F Auckland, New Zealand. The peanut kernels were to be from the "1980 Thailand Crop" and payment was to be effected by a confirmed irrevocable letter of credit available if the draft and bill of lading were accompanied by (a) a Singapore Government issued Aflatoxin Free Certificate; (b) a Certificate of Crop 1980; and (c) a Certificate that the goods were packed in sound clean bags not previously used for any purpose.

After shipment of the goods, the defendants presented to the advising bank the relevant bill of lading evidencing the shipment, the draft drawn on the plaintiffs, the Fumigation Certificate of the Port of Singapore Authority, their Certificate of 1980 Thailand Crop, the Aflatoxin Free Certificate of the Department of Scientific Services, Singapore, accompanied by a firm of surveyors' certificate that they (the surveyors) had drawn at random a sample for the Department's analysis, the Surveyors' Certificate of Weight and Quality and their Certificate of Inspection. They were duly paid for the consignments.

The present dispute arose when the goods arrived in Auckland by separate shipments. The plaintiffs rejected the goods and alleged that the goods did not correspond with the samples and were of seriously inferior quality. They also alleged that the goods were not from the 1980 Thailand Crop as described but were from an older crop in respect of a large proportion, some 20%, of the peanut kernels. They further alleged that the goods were "unfit for human consumption and were by reason of the mould aflatoxin age and degree of infestation by insects of unmerchantable quality." The defendants disputed these allegations and refused to reimburse the plaintiffs. The plaintiffs obtained an order appointing a Special Examiner for the purpose of taking the evidence of their witnesses in Auckland, bearing on, *inter alia*, the condition of the peanut kernels on arrival, the degree of insect infestation, the level of aflatoxin, and the quality of the peanuts compared with that of the samples. The evidence shows that all the three shipments of peanut kernels contained a high level of aflatoxin, far in excess of the permissible limit of 15 parts per billion. The cause of the problem was the condition of the peanut kernels and the presence of insects before shipment. The plaintiffs claimed the sum of US$535,244.08, or, alternatively, damages, interest and costs.

Held, allowing the claim: (1) the court was not satisfied that the samples delivered to the Department of Scientific Services were representative of the peanut kernels shipped to the plaintiffs;

(2) the defendants were in breach of section 15 of the Sale of Goods Act, 1979. The sale was a sale by sample, a fact not in dispute, and what was tendered to the plaintiffs consisted some 20% shrivelled peanut kernels and worse, they were not aflatoxin free. All three shipments contained aflatoxin far in excess of the permissible limit of 15 parts per billion;

(3) the defendants were also in breach of the implied undertaking laid down by Diplock J. in *Mash & Murrell Ltd.* v. *Joseph I. Emanuel Ltd.* [1961] 1 W.L.R. 862, 865.

(4) judgment will be entered for the plaintiffs in the sum of US$535,244.08 together with interest thereon at 8% p.a. calculated from January 1, 1982, to date of judgment, with costs to the plaintiffs.

Case referred to:

(1) *Alfred C. Toepfer* v. *Continental Grain Co.* [1974] 1 Lloyds Rep. 11.

CIVIL SUIT.

Hiew Hin Chung for the plaintiffs.

Clive Heng for the defendants.

Cur. Adv. Vult.

Lai Kew Chai J.: The plaintiffs as buyers of some 314 metric tons of peanut kernels under a contract concluded just before Christmas 1980 are claiming the return of the purchase price of the goods together with the cost of insurance, landing charges, legal fees, survey charges and interest thereon. They claim the sum of US$535,244.08 or, alternatively, damages, interest and costs.

It is common ground that by two contracts in writing contained in telexes dated December 19 and 22, 1980 and entered into between the plaintiffs and the defendants, which were in all material respects reproduced in the defendants' form of contract, the defendants agreed to sell to the plaintiffs a maximum of 314 metric tons of peanut kernels of 60/70 pieces per ounce TBS (*i.e.* Thai Brown Skin) to be packed in new jute bags at the price of US$1,447 per metric ton C & F Auckland, New Zealand. It was further agreed that the peanut kernels shall be from the "1980 Thailand Crop." It is also common ground that payment was to be effected by a confirmed irrevocable letter of credit available if the draft and bill of lading were accompanied by (a) a Singapore Government issued Aflatoxin Free Certificate; (b) a Certificate of Crop 1980; and (c) a Certificate that the goods were packed in sound clean new bags not previously used for any purpose.

By paragraph 3 of the Re-re-amended Statement of Claim the plaintiffs aver that the sale of the goods was by description, namely "1980 Thailand Crop." Accordingly, the plaintiffs say that it was an implied condition or, alternatively, the defendants had warranted that the goods would correspond with the said description and would be merchantable under the said description.

Further the plaintiffs say that they had agreed to buy the goods from the defendants who sold the goods in the course of their (defendants') business and that, therefore, it was an implied term of the said contract that the goods should be of merchantable quality.

By paragraph 5 of the Statement of Claim the plaintiffs make the further and alternative averment that the sales were sales by samples which the defendants had supplied prior to the conclusion of the contract and on the basis of which the contract was concluded. The plaintiffs therefore say that it was an implied term of the contract that the bulk of the goods should correspond with the said samples, which were in fact supplied by the defendants, and that the goods should be free from any defect rendering the same unmerchantable and which would not be apparent on reasonable examination of the said samples. Finally, it is claimed that the plaintiffs as buyers should have a reasonable opportunity of comparing the bulk with the samples.

The defendants deny that the peanut kernels they had shipped were unmerchantable. They deny that they were not in accordance with description or sample and put the plaintiffs to strict proof of these allegations. By paragraph 7 of their defence, they say that the contract was a "C & F" contract and, accordingly, the risk and property in the goods passed to plaintiffs upon shipment. The defendants further aver that if the goods had deteriorated or were otherwise unmerchantable, which they deny, the deterioration or unmerchantability was in fact caused by the neglect of the plaintiffs. In response to a request for further and better particulars of the allegations of such neglect, the defendants filed the particulars in these terms:

> "The said goods when shipped were merchantable and ought to have been merchantable upon arrival at destination. If when examined, the said goods had deteriorated or were otherwise unmerchantable, which is denied, then such deterioration or unmerchantability was occasioned either by some cause unknown to the defendant or by inference by the neglect or act of the plaintiffs."

In the event, in January and February 1981 the defendants shipped in 18 containers three consignments of peanut kernels to the order of plaintiffs. The plaintiffs had bought the goods for sub-sale to Sanitarium Health Foods whose initials "SFH" appeared as markings on the jute bags of peanut kernels. The three consignments were (1) 4,292 bags or 198.145 tonnes of peanut kernels shipped on m.v. "Nedlloyd Albany" under Bill of Lading No. 733 dated January 20, 1981, which vessel arrived at Auckland, New Zealand on February 10, 1981; (2) 2,072 bags containing 82.88 tonnes peanut kernels shipped on m.v. "Nedlloyd Adelaide" under Bill of Lading No. 607 dated February 9,1981, which vessel arrived at Auckland, New Zealand on March 6, 1981; and (3) 824 bags containing 32.975 tonnes peanut kernels shipped on m.v. "Strathmuir" under Bill of Lading No. 18 dated February 24, 1981, which vessel arrived at Auckland, New Zealand on March 18, 1981.

After the shipments the defendants in the case of each of the three consignments presented to the advising bank the relevant bill of lading evidencing the shipment, the draft drawn on the plaintiffs, the

Fumigation Certificate of the Port of Singapore Authority, their Certificate of 1980 Thailand Crop, the Aflatoxin Free Certificate of the Department of Scientific Services, Singapore accompanied by a firm of surveyors' certificate that they (the surveyors) had drawn at random a sample for the Department's analysis, the Surveyors' Certificate of Weight and Quality and their Certificate of Inspection. The defendants were duly paid for the three consignments.

However, the plaintiffs allege that on their arrival of the separate shipments in Auckland, New Zealand, the goods were inspected by them and they did not correspond with the samples and were of seriously inferior quality. The plaintiffs further allege that the goods were not from the 1980 Thailand Crop as described but were from an older crop in respect of a large proportion, some 20%, of the peanut kernels. Further, they say that the said goods were "unfit for human consumption and were by reason of the mould aflatoxin age and degree of infestation by insects of unmerchantable quality." The defendants disputed these allegations and they refused to reimburse the plaintiffs.

At this stage I should say something about aflatoxins. Aflatoxins are carcinogenic toxins produced mainly by the mould, known as Aspergillus Flavus. The mould, which is found on peanut kernels, is a living micro-organism and it proliferates and produces toxins in moisture and under favourable physical, chemical and biological conditions.

At all material times the quantitative presence of aflatoxin in peanut kernels at or below 15 parts per billion (or 15 ppb) was acceptable and the peanut kernels would be regarded as aflatoxin free. Anything in excess of 15 ppb was unacceptable, although in New Zealand at the material time there was no such regulation. However, in 1984 this regulation was introduced in New Zealand.

In October 1981 the plaintiffs instituted proceedings in the High Court to seek the reliefs I have referred to. On October 15, 1984, the plaintiffs obtained an order appointing Mr. Anthony Frederick Grant, a solicitor in Auckland, New Zealand, as Special Examiner for the purpose of taking the evidence of the plaintiffs' witnesses, including several expert witnesses, bearing on the arrived condition of the peanut kernels, the degree of insect infestation, the level of aflatoxin, the conditions of the "shrivelled" nuts, the manner and extent of sampling, the steps taken to salvage the consignments and the quality of the peanuts compared with the samples. These aspects of the evidence should be self-evidently clear as they are set out.

The Special Examiner took the evidence over eight working days commencing December 3, 1985. The depositions were extensive. The evidence on survey and sampling is this. After the first shipment on m.v. "Nedlloyd Albany" had been discharged on Freyberg Wharf, Auckland, the plaintiffs instructed Richard Newbery, a marine surveyor, of G.W. Dunsford & Associates to survey the 4,929 bags of peanut kernels which were shipped in eleven 20-foot containers. Newbery's mandate was not to conduct any general survey of the shipment. In fact, he was instructed initially to ascertain if the consignment needed fumigation, the expenses for which the plaintiffs had taken out an insurance. Fumigation was carried out. On February 12, 1981 he inspected the consignment alone without any other help and took samples from the face of the stow in ten containers as he could not gain access to the 11th container. He went back two days later to take a sample from the 11th container. The samples for insect infestation along with a small sample of the kernels from one bag were placed in polythene bags and were duly marked with the container numbers and sealed with a wire twist. Newbery handed the sample to a firm of analysts, Messrs TJ Sprott & Associates who had in their employ Olaf Harald Skarsholt, a Consulting Chemist, who was in overall charge of the analyses and Quenton Earle Dodwell, an industrial microbiologist who conducted a qualitative, though on account of a lack of the necessary equipment, not a quantitative analysis for the presence, if any, of aflatoxin.

On February 23, 1981, T J Sprott & Associates sent 12 samples which they had made from those they had received from Newbery to Dr Alice Earnshaw to identify the insects and the extent of insect damage.

Two of the 11 containers of the first shipment *ex* "Nedlloyd Albany" were delivered to the premises of the end-buyers, Messrs Sanitarium Health Foods at Pah Road, Auckland. The two containers were devanned and the bags of peanut kernels were stored away from the usual storage area of the end-buyers because of their poor condition on visual examination. By means of a steel sampler Newbery took representative samples from 140 bags of peanut kernels from one container and from 132 bags from the other container. He therefore had taken random samples from 30% of the total number of

bags of peanut kernels in the two containers. He divided these samples into three composite lots, one of which he handed to T J Sprott & Associates on February 13, 1981.

Newbery also took samples from the other 9 containers which had by then been stored in the open at the container depot of Bridge Freight Limited in Auckland. They were exposed to the humidity and the heat of the summer in New Zealand. The nine containers were not devanned and the samples of 6 lbs each taken from each container were therefore taken from the face of the stow, that is from the bags of peanut kernels which could be reached at one end of the container where the doors were open. Newbery handed these samples to TJ Sprott & Associates on February 16, 1981.

As TJ Sprott & Associates could only carry out qualitative tests for the presence of aflatoxin, and not any quantitative tests of the same, it was decided that samples had to be sent to Foodlab Lipid Research Pty Limited of Sydney, Australia, to obtain the quantitative analyses. In this connection, it is important to trace when and from where the samples sent to Foodlab Lipid Research Pty Limited were taken by Newbery. It was only on March 26, 1981, that Newbery took samples of 6 lbs each from either 40 or 50 bags of peanut kernels from each of the 9 containers accessible at the face of the stow. I regret the delay. These containers had been sitting in the open exposed to the elements of the New Zealand summer at the depot of Bridge Freight Limited since about February 12, 1981. On March 30, 1981, Newbery further took samples of 6 lbs each from the 132 bags and 140 bags which had been devanned from the two containers delivered at the premises of the end-buyers, Sanitarium Health Food. It was only on March 30, 1981, that Newbery handed these samples from the 11 containers *ex* "Nedlloyd Albany" to T J Sprott & Associates who sent them to Foodlab Lipid Research Pty Limited. The fact that Foodlab Lipid Research Pty Limited received them only on April 8, 1981, for the purpose of quantitative analyses of the aflatoxin level is a significant fact to note in this case.

With regard to the second shipment of 5 containers of peanut kernels *ex* "Nedlloyd Adelaide," they arrived at Auckland on March 6, 1981. Samples were taken in the face of the stow by either the Department of Health of New Zealand or the marine surveyors within 4 days after their arrival which were delivered to the Department of Scientific & Industrial Research in Auckland where, as will emerge later, Dr Stanton carried out quantitative tests for aflatoxin, and to T J Sprott & Associates. So far as sampling for the quantitative analyses for aflatoxin in Australia is concerned, they were sampled by Newbery's firm also on March 26, 1981 (after a lapse of some 20 days), and handed to T J Sprott & Associates on March 30, 1981, who despatched them to Foodlab Lipid Research Pty Limited which received them also on April 8, 1981.

I now trace the process of sampling the peanut kernels discharged from the third shipment ex m.v. "Strathmuir" which arrived at Auckland on March 18, 1981. On March 24, 1981, Mr. Davidson of the Department of Health, Auckland, took representative samples from the two containers of peanut kernels *ex* "Strathmuir." From those samples, he delivered a representative sample to Dr Stanton of the Department of Scientific and Industrial Research, Auckland. On April 24, 1981, G.W. Dunsford & Associates Ltd took samples of 6 lbs each from the two containers which were sent to the defendants and to the defendants' suppliers of the peanut kernels from Bangkok.

In these circumstances, it will be seen that so far as the first shipment is concerned the samples taken from the sacks of peanut kernels for the quantitative (as opposed to the qualitative) analyses to determine the levels of aflatoxin in a laboratory in Australia were taken from the containers which had been left sitting in the open and at the height of the New Zealand summer for long stretches of time. During this period, there were high ambient temperatures, humidity within the containers and sunshine, which were conditions most conducive to the growth of Aspergillus Flavus. The containers *ex* "Nedlloyd Albany" were left in the open for 44 days before samples were taken from them for the Aflatoxin quantitative (as opposed to qualitative) analyses in Australia. But the second and third shipments were analysed for the amount of aflatoxin within a short time. I will have to decide the question of fact as to whether there had been deterioration of the peanut kernels by reason of the growth of Aspergillus Flavus which produced the aflatoxin.

With regard to the samplings for the Department of Scientific & Industrial Research which were taken on March 13, 1981, for the second shipment *ex* "Nedlloyd Adelaide" and on March 24, 1981, for the third shipment *ex* "Strathmuir," they were taken after the containers had been left at the

wharf for about 4 days and 6 days respectively after discharge. This fact has to be borne in mind in relation to the defendants' contention that during this period the condition of moisture content exceeding 9% was such that "exponential growth of aspergillus and the sharp increase of aflatoxin had already commenced and was then rampant."

I now recall the evidence taken in New Zealand bearing on (a) whether the peanut kernels were of the 1980 Thailand Crop; (b) extent of insect infestation; and (c) the quality of the peanut kernels as compared with the samples.

As the presence or otherwise of aflatoxin in the peanut kernels in New Zealand is of considerable importance in this case, I shall separately deal with the evidence on this aspect.

Jerry Peng, the purchasing officer of Sanitarium Health Food Company, was the person who placed the order for the peanut kernels. He dealt with Carlson of the plaintiffs. He said he was shown the samples of the peanuts before he agreed to buy. In cross-examination, he agreed that some of the peanuts in the sample were darker than others and that some of them had wrinkles in them. He inspected some of the peanuts from the sacks taken out of the two containers *ex* "Nedlloyd Albany." He noticed there were some small darkish shrivelled nuts among some good nuts. The sacks of peanut kernels in the two containers devanned at his employers' premises were found to be mouldy and he saw to it that they were unloaded at a different part of the factory. He was present when Newbery took the samples and photographs of them. These photographs were produced in evidence. He and his superior in the presence of Newbery inspected the condition of the sacks of peanut kernels in the other nine containers which were sitting in the Bridge Freight Depot, Northshore, Auckland and in the wharf. They found that there was mould growth on the sacks upon opening the doors of each container as well as dead insects on the floors of the containers, which must have perished as a result of fumigation carried out by the Port of Singapore Authority in Singapore. It should be noted that they had seen only the sacks of peanut kernels in the way of the door and that they did not give any evidence of any rancid odour emitting from within the containers.

Jerry Peng was not asked any question on whether the peanut kernels were of the 1980 Thailand Crop nor on the presence of aflatoxin. This was obviously because he could not have said anything useful. However, he said that having regard to the condition of peanut kernels examined and the mould growth on the sacks in the containers on the wharf his company decided to reject the entire consignment.

Furthermore, Jerry Peng clearly said in evidence that if it was just a problem of insect infestation, the company would not have rejected the entire consignment.

I will now consider the evidence produced by the plaintiffs as to the presence and quantity of aflatoxin present in the peanut kernels. On their arrival in Auckland, New Zealand, Olaf Harald Skarsholt, a Consulting Chemist employed by T J Sprott & Associates, received samples of the first shipment from Newbery. His tests revealed that all the samples were infected to a greater or less extent by the mould technically called aspergillus flavus. This micro-organism produces aflatoxin and any foodstuff infected with aspergillus flavus is highly suspect. Mr. Skarsholt therefore tested the peanuts for the presence of aflatoxin. He adopted a chemical extraction procedure, which he described in evidence, during which he observed that there was a "strong positive reaction for aflatoxin" in the extract of all 11 samples.

Mr. Skarsholt also observed that 20% of the samples were old shrivelled nuts. He opined that the cause of the problem was the condition of the peanut kernels and the presence of insects before shipment. He also said that from his experience that where only a few bags had been poorly stored or where there is isolated ingress of water, the problem of the growth of aspergillus flavus would not be so widespread. He also confirmed that the photographs exhibited showed the peanuts in the same condition as the samples analysed by him.

The other person in T J Sprott who tested the samples was Mr. Quenton Earle Dowdell, an Industrial Microbiologist. He said that the type of growth of aspergillus flavus in the peanut kernels in question would probably require not less than a month to develop. He tested the samples to determine the mould counts and the moulds present. He expected the quantitative content of aflatoxin to be high and that what was later established by the laboratory in Australia as the quantities of aflatoxin in the 16 samples, where the contents ranged between 220 and 2,000 parts per billion well above the permitted limits of 15 parts per billion, confirmed what he had expected as the quantitative contents of the samples. The defendants in cross-

examination had repeatedly criticised the accuracies of both the qualitative and quantitative tests carried out in New Zealand on the grounds that the former were crude and inaccurate and that the latter were based on samples taken all too late or from the misleadingly inaccurate bags in the face of the stowages in all the containers.

The samples taken from the second and third shipments by the Department of Health, Auckland for analyses by the Department of Scientific and Industrial Research, however, were within a few days of the arrival of and discharges from the two vessels. Dr. Donald William Stanton, an analytical chemist in the department, and a Ph.D. in Organic Chemistry, had since 1977 developed a procedure to test the quantity of aflatoxin. It was called the AOAC BF method which was internationally recognised. He gave a brief description of the analytical procedure in these words: "... the sample is homogenised in a blender and an aliquot was extracted with aqueous methanol, centrifuged, extracted with chloroform, and the aflatoxin concentration determined by thin layer chromotography." According to him, the sample of peanut kernels from m.v. "Nedlloyd Adelaide," taken 4 days after the discharge from the vessel, contained 400 parts per billion of aflatoxin B1 and 50 parts per billion of aflatoxin B2. In respect of the sample from m.v. "Strathmuir," taken 6 days after discharge, he found that it contained 650 parts per billion of aflatoxin B1 and 130 parts per billion of aflatoxin B2. Both results were recorded in two letters from his department to the Medical Officer of Health, Auckland, and dated March 20 and 31, 1981. These important exhibits were marked "Aa" and "Bb" respectively.

The defendants have been trading in peanut kernels for some years. They bought mainly Guangdong peanut kernels from the Peoples' Republic of China which are far more superior and more expensive than the peanut kernels in question. At all times, the defendants had stocks of them in their warehouse. They had bought the peanut kernels in question from a Thai company known as Kong Peng Limited Partnership. The purchases, large as they were, were concluded apparently by telephone. They were bought at prices far below than that paid by the plaintiffs. Mr. Sant Euachanok from this company in his evidence claimed that the peanut kernels in question which he had shipped to the defendants for sale to the plaintiffs had come from the September 1980 harvest. In this he was contradicted by Dr. Arvud, a Thai agricultural specialist, called by the defendants. Dr Arvud said that this was impossible as the harvesting and drying processes were still taking place when the three consignments of the peanut kernels in question were shipped from Bangkok to Singapore on November 24, 1980, December 10, 1980, and on January 4, 1981. By implication, Dr Arvud was saying that the peanut kernels came from an earlier crop, namely the December 1979/January 1980 crop known as the dry season crop. Peanut kernels would become rancid six months from the time they were de-shelled from their pods. If they were not de-shelled from their pods, they would last longer without going rancid. Although the first shipment to Auckland had been stored in Singapore for about 16 days, the second and third shipments had been stored in Singapore for over two months. I find that the danger of deterioration must have been present for all three shipments, certainly for the second and third shipments so much so that the defendants had to keep the last two shipments in cold storage at some expense.

As required by the terms of the contract, the defendants had to tender, among others, a Singapore Government issued aflatoxin free certificate, a certificate of crop 1980 and a certificate that the peanut kernels were packed in sound clean new bags. The defendants employed two firms of cargo surveyors to carry out random sampling for analyses by the Government chemist and to certify the weight and condition of the shipments. Aflatoxin free certificates were issued for all three shipments by the Department of Scientific Services, Singapore on the basis of the samples tendered to them. The accuracies of the scientific analyses depended on the representative accuracies of the samples taken. As regards the certificate of the year in which the crop was harvested, no governmental agency in Thailand could issue it. The defendants did not require such certificates from their Thai suppliers who, knowing the trade and the harvesting occurrences in Thailand, would have been the more appropriate party to issue the same. Instead the defendants issued their own certificates and drew the credit under the letter of credit opened by the plaintiffs.

I now turn to the survey and sampling of the peanut kernels in question carried out in Singapore. The first shipment was surveyed and sampled by Francis Tan of Richards Hogg International. He took samples from 70 bags out of 4,929 bags of peanut kernels. He was unaware that the defendants' warehouse had 5,300 bags of peanut kernels out of which there were 71 bags of Thai peanut

kernels and 300 bags of Guangdong peanut kernels, the latter being of unquestionably superior quality when compared with the Thai peanut kernels. I was not satisfied with the adequacy and reliability of the sampling.

The survey and sampling of the second and third shipments were also unsatisfactory. Jimmy Choo, a self-made surveyor of International Surveying Organisation, carried out the survey and sampling quite some time before the shipments left Singapore. In fact, the last shipment on m.v. "Strathmuir" was surveyed nearly one month before shipment. He was not a helpful witness and I find his assertion that he had taken 56 lbs of peanut kernels out of 235 bags difficult to accept. Again, in the cold rooms where the bags of peanut kernels were, there were some 40 metric tons of peanut kernels which were not shipped to Auckland, New Zealand. They were allegedly sold in Singapore but no document in any way connected with such sales were produced.

All the bags of peanut kernels surveyed and sampled by both Francis Tan and Jimmy Choo bore the shipping marks of the defendants, namely "L.A." being the initials of the name of the defendants enclosed in a diamond-shaped sign. Yet their reports made no reference to this at all.

Having regard to all the evidence on the survey and sampling of the peanut kernels and having heard and seen both Francis Tan and Jimmy Choo I cannot say that they inspired confidence in me.

In the circumstances, I was not satisfied that the samples delivered to the Department of Scientific Services were representative of the peanut kernels shipped to the plaintiffs. I find that the defendants were in breach of section 15 of the Sale of Goods Act, 1979. The sale was a sale by sample, a fact not in dispute, and what was tendered to the plaintiffs consisted some 20% shrivelled peanut kernels and worse, they were not aflatoxin free. All three shipments contained aflatoxin far in excess of the permissible limit of 15 parts per billion. I have no hesitation in accepting the evidence of Messrs. Skarsholt, Dowdell and Dr. Stanton. The evidence of Dr. Stanton, in respect of the last two shipments, was singularly impressive. His incisive and manifestly fair answers given with a remarkable economy of language left me with a clear impression that, although I did not have the benefit of seeing him in person, he comes through the records as extremely competent, reliable and a fair-minded person.

There is another way of considering the duties of the defendants who had agreed to sell on C & F Auckland, New Zealand terms, which involved a sea voyage from Singapore to Auckland. The responsibility of the defendants as implied by law in those circumstances is set out in *Benjamin's* Sale of Goods, 2nd edn., para 1541 which is in the following terms:—

> *"Implied undertaking that goods can endure normal transit.* In *Mash & Murrell Ltd.* v. *Joseph I. Emanuel Ltd.* Diplock J. said: 'When goods are sold under a contract such as a c.i.f. contract, or f.o.b. contract, which involves transit before use, there is an implied warranty not merely that they shall be merchantable at the time they are put on the vessel, but that they shall be in such a state that they can endure the normal journey and be in a merchantable condition on arrival'; and for a reasonable time thereafter to allow for disposal, or use, as the case may be. Similar statements have been made in a number of other cases which show that the implied 'warranty' is not restricted to c.i.f. and f.o.b. contracts, but applies to all cases in which transit before disposal or use is within the contemplation of the parties. The seller's undertaking of fitness for a particular purpose will, when it arises, have a similar scope. In *A.B. Kemp Ltd.* v. *Tolland* Devlin J. said that the effect of this implied undertaking (in relation to a sale of peaches) was that 'the sellers warrant that the goods, at the time of sale, are in such a condition that, unless that condition is unnaturally changed, they will, at the end of normal period of journey ... be still fit for human consumption.' But the burden of proving that the goods were not in this condition lay on the buyers; and as they failed to discharge this burden it was held that they were liable for the price."

In view of my findings of fact as set out earlier, the defendants were also in breach of the implied undertaking laid down by Diplock J. (as he then was).

It was also contended on behalf of the defendants that in the contract reproduced by the defendants there was a condition that the Government issued aflatoxin free certificates shall be final and they relied on *Alfred C. Toepfer* v. *Continental Grain Co.*[1] The terms of the contract for sale were all set out in the exchange of telexes and I am convinced that the term as to the finality of the certificates, which the defendants had unilaterally inserted in the agreement prepared by them, was not noticed by nor agreed to by the responsible employees of the plaintiffs. In any case, this plea was not at all asserted in the Defence. Even if such a term was agreed I very much doubt if the certificates in this case, which were based on samples over which I was not confident, could hardly be said to be the certificates contemplated by the parties when agreeing to the clause.

Accordingly, judgment will be entered for the plaintiffs in the sum of US$535,244.08 together

with interest thereon at 8% p.a. calculated from January 1, 1982 up to date hereof. I also award costs to the plaintiffs.

Order accordingly.

Solicitors: *Godwin & Co.; Murphy & Dunbar.*

YIP HOCK CHYE & ORS. v. SANTAN ENGINEERING PTE. LTD. (IN RECEIVERSHIP) & ANOR.

[O.C.J. (Lai Kew Chai J.) May 6, 1987]

[Singapore – Originating Summons No. 1274 of 1985]

Company Law – Floating charge over assets of chargors – Receivers and managers appointed – Termination of employees' services without notice or payment – Claim by employees for salaries – Whether having priority over floating charge – Employment Act (Cap. 91, 1985 Ed.), s.10 (3) – Companies Act (Cap. 50, 1985 Ed.), ss. 226, 328(1) (b) & (2).

Company Law – "Salary" – Meaning of – Scope of Companies Act (Cap. 50, 1985 Ed.), s. 328(1)(b) – Application of maxim, lex non cogit ad impossibilia.

Employment – Salaries – Whether having priority over floating charge – Companies Act (Cap. 50, 1985 Ed.), s. 328(1)(b).

The 31 plaintiffs were former employees of the first defendants which under a deed of debenture charged their assets to the second defendants by way of a floating charge. The plaintiffs claimed against the first defendants the total sum of $74,759.19 being salaries payable to them in lieu of notices of termination of their respective contracts of employment with the first defendants. As against the second defendants, the plaintiffs claimed a declaration that the said sum be paid out of the assets of the first defendants in priority to the claims of the second defendants. On September 5, 1985, the second defendants appointed three persons to be the receivers and managers of the assets of the first defendants under the debenture and on the following day the receivers and managers terminated the services of all 31 plaintiffs without any notice of termination or any payment of salary in lieu of notice. The question for determination was whether the plaintiffs' claim ranked in priority over the second defendants' floating charge.

Under section 328(1)(b) of the Companies Act (Cap. 50, 1985 Ed.) a claim for "salary" of an employee becomes a preferential debt when two conditions are met: (a) the amount claimed does not exceed five times the monthly salary of the claimant; and (b) it is "in respect of services rendered by the (claimant) within a period of four months before the commencement of the winding up." In this case, it was not disputed that the claims of the plaintiffs had complied with the first condition. However, with regard to the second condition, the defendants contended that the plaintiffs' claims had arisen only *after* and not before the appointment of the receivers.

Held, allowing the plaintiffs' claims: (1) the court would adopt the approach suggested by the plaintiffs' counsel *i.e.* in a claim for salary in lieu of notice of termination, it is not necessary to show that the "salary" claimed is in respect of services rendered by the employee to the company within a period of four months before the commencement of the winding up of such company. In this regard, the plaintiffs' counsel relied on the maxim that the law does not compel a man to do that which he cannot possibly perform: *lex non cogit ad impossibilia;*

(2) order in terms of the originating summons with interest on the sum of $74,759.19 at 10% per annum calculated from September 6, 1985, would be awarded to the plaintiffs.

Cases referred to:

(1) *Re Leeds Twentieth Century Decorators* [1962] C.L.Y. 365.
(2) *Re VIP Insurance Ltd. and The Companies Act* (1978) 3 A.C.L.R. 751.
(3) *Heydon's Case* (1584) 3 Rep. 7a; 76 E.R. 637.

ORIGINATING SUMMONS.

Goh Kok Leong for the plaintiffs.
Ronnie Quek for the defendants.

Cur. Adv. Vult.

Lai Kew Chai J.: In this originating summons all 31 plaintiffs, who were formerly employees of the first defendants, claim the sum of $74,759.19 being salaries payable to them in lieu of notices of termination of their respective contracts of employment with the first defendants. As against the second defendants, who were debenture holders with a floating charge over the assets of the first defendants, the plaintiffs also claim a declaration that the said sum of $74,759.19 be paid out of the assets of the first defendants comprised in or subject to any floating charge in priority to the claims (if any) of the second defendants. The plaintiffs also seek an order that such sum be paid to the plaintiffs out of such assets or proceeds thereof. As against the first defendants, they also ask for interest on the said sum of $74,759.19. The plaintiffs also ask for costs of the application against both the defendants.

The facts may be recited within a very brief compass. Under the terms of their respective contracts of employment or under section 10(3) of the Employment Act (Chapter 91 Revised Edition 1985) the plaintiffs were entitled to be paid salaries in lieu of their applicable periods of notices to terminate their employment except in four cases